

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

HARRY MARCUS,

Petitioner,

vs.

Case No. 14-2554

DEPARTMENT OF MANAGEMENT  
SERVICES, DIVISION OF  
RETIREMENT,

Respondent.

\_\_\_\_\_ /

RECOMMENDED ORDER

This case came before Administrative Law Judge Darren A. Schwartz for final hearing by video teleconference on July 31, 2014, with sites at Lauderdale Lakes and Tallahassee, Florida.

APPEARANCES

For Petitioner: Harry Marcus, pro se  
831 Cumberland Terrace  
Davie, Florida 33325-1236

For Respondent: Larry D. Scott, Esquire  
Department of Management Services  
4050 Esplanade Way, Suite 160  
Tallahassee, Florida 32399

STATEMENT OF THE ISSUES

Whether Petitioner, Harry Marcus ("Petitioner"), timely claimed creditable service for retirement benefits pursuant to section 121.085, Florida Statutes, and whether the adult education teacher position Petitioner held, for which he seeks

creditable service for retirement benefits, was a temporary position.

PRELIMINARY STATEMENT

On February 20, 2014, Respondent, Department of Management Services, Division of Retirement ("Respondent"), issued a final agency action letter to Petitioner, informing Petitioner that his request for creditable service for retirement benefits was denied, because the position he held for which he seeks creditable service was a temporary position. Dissatisfied with Respondent's determination, Petitioner timely filed a request for an administrative hearing.

On April 23, 2014, Respondent issued a supplemental final agency action letter to Petitioner, informing Petitioner that his request for creditable service was denied because his request was untimely pursuant to section 121.085. Respondent stated in its April 23, 2014, letter that it was placing "its February 20, 2014 final agency action letter into abatement until the issue presented in this supplemental final agency action letter is determined." Dissatisfied with Respondent's determination as set forth in the April 23, 2014, letter, Petitioner timely filed a second request for an administrative hearing. Furthermore, in his second request for an administrative hearing, Petitioner specifically requested that "the abatement be lifted and a hearing date be set."

On May 30, 2014, Respondent referred this matter to the Division of Administrative Hearings ("DOAH") to assign an Administrative Law Judge to conduct the final hearing.

On June 5, 2014, the undersigned issued a Notice of Hearing by Video Teleconference ("Notice"), setting this matter for final hearing on July 31, 2014. The Notice states the issue as follows: "Whether Petitioner timely claimed creditable service pursuant to section 121.085, Florida Statutes."

On July 29, 2014, a telephonic pre-hearing conference was held with the parties. During the conference, the parties agreed to go forward with the hearing on July 31, 2014, and that the hearing would involve both issues of whether Petitioner timely claimed creditable service pursuant to section 121.085, and whether the adult education teacher position Petitioner held, for which he seeks creditable service for retirement benefits, was a temporary position.<sup>1/</sup>

At the final hearing, Petitioner testified on his own behalf, and Petitioner's Exhibits 1, 3, 4, 6, 7, 12, and 14 through 16 were received into evidence. Respondent presented the testimony of Petitioner, Ronley Alexander, Stephen Bardin, and Joyce Morgan,<sup>2/</sup> and Respondent's Composite Exhibits 1 through 8 were received into evidence. At the hearing, the undersigned granted Respondent's request for official recognition of the following Florida Statutes and rules of the Florida

Administrative Code: sections 121.021(11), 121.021(52) (b), 121.021(53) (b), 121.193, and 121.085; and Florida Administrative Code Rules 60S-1.002 and 1.004.

The final hearing was recorded, but no transcript was filed. At the conclusion of the final hearing, the parties agreed that their proposed recommended orders would be filed by August 20, 2014. Respondent timely filed a Proposed Recommended Order, which was given consideration in the preparation of this Recommended Order. Petitioner filed a Proposed Recommended Order on August 21, 2014, one day late. Nevertheless, Petitioner's Proposed Recommended Order was given consideration in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. The Florida Retirement System ("FRS") is a public retirement system as defined by Florida law. Respondent is charged with managing, governing, and administering the FRS.

2. On February 12, 1979, Petitioner began employment with the Florida Department of Labor & Employment Security ("FDLES"), an FRS-participating employer. By reason of this employment, Petitioner was enrolled in the FRS, and FDLES made contributions to the FRS on his behalf.

3. On January 4, 1991, Petitioner voluntarily resigned his employment with FDLES. At that time, Petitioner had 11 years and

11 months creditable service with FRS based on his employment with FDLES.

4. On January 23, 1991, Petitioner submitted a Florida Retirement System Application for Service Retirement to the State of Florida, Department of Administration, Division of Retirement ("DOA Division of Retirement").<sup>3/</sup>

5. On February 28, 1991, Petitioner submitted a request to the DOA Division of Retirement, that his application for service retirement be withdrawn. On March 12, 1991, the DOA Division of Retirement canceled Petitioner's application for service retirement. At that time, the DOA Division of Retirement advised Petitioner that:

Your retirement date will be the first of the month following your termination date if your retirement application is received by us within 30 days after your termination date. If the application is received after the 30 days, your retirement date will be the first of the month following the month we receive it.

6. On September 27, 1993, Petitioner began employment with the Broward County, Florida, School Board ("School Board") as a part-time, temporary, adult vocational education instructor at "Whispering Pines." Whispering Pines is an "off-campus" adult education program. The School Board is an FRS-participating employer.

7. Petitioner was employed by the School Board from September 27, 1993, until April 2009, when he voluntarily resigned his employment with the School Board.

8. Throughout Petitioner's entire employment with the School Board, he was compensated on an hourly basis and held the same position, that of a part-time, temporary, adult vocational education instructor.

9. Each school year throughout his employment with the School Board, Petitioner signed an Agreement for Part-Time Instruction in Vocational, Adult and Community Education. By signing the agreement, Petitioner acknowledged that his employment was part-time, temporary, and subject to School Board Policy 6Gx6-4107. Each of the agreements for part-time instruction that Petitioner signed, provided that:

THE ADMINISTRATOR MAY TERMINATE THIS AGREEMENT UPON NOTICE. This appointment is contingent upon sufficient enrollment and attendance in the course assigned or the class will be cancelled and this agreement shall be null and void.

The instructor's signature below indicates acceptance of the appointment subject to all terms and conditions of Board Policy 6Gx6-4107 which is printed on the reverse side of this agreement.

\* \* \*

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA

6Gx6-4107

6Gx6-4107

**PART-TIME, TEMPORARY INSTRUCTIONAL PERSONNEL  
IN VOCATIONAL, ADULT, AND COMMUNITY EDUCATION  
PROGRAMS**

EMPLOYMENT OF PART-TIME, TEMPORARY  
INSTRUCTIONAL PERSONNEL IN VOCATIONAL, ADULT,  
AND COMMUNITY EDUCATION PROGRAMS SHALL BE  
APPROVED, ASSIGNED AND PAID IN ACCORDANCE  
WITH THE RULES.

AUTHORITY: F.S. 230.22(1)(2)

Policy Adopted: 5/3/84

**Rules**

1. The conditions of employment listed herein apply only to those instructional personnel employed on a part-time, temporary basis to teach courses on a course by course basis or to provide part-time instructional support to programs in post-secondary adult vocational education, adult general education, Community Instructional Services, and education for personal improvement.
2. Part-time, temporary teachers shall have no guarantee or expectation of continued employment and may be terminated upon written notice by the location administrator.
3. A part-time, temporary employee must meet the same employment criteria as full-time employees with the exception that full-time or part-time teaching certificates may be accepted. Community Instructional Services and Education for Personal Improvement teachers need not be certified. The superintendent is authorized to appoint personnel to positions covered by this policy pending action by the School Board at its next regular or special Board meeting.
4. The principal (or administrative designee) shall recommend for employment only persons who have completed all requirements for the recommended position. Instructors appointed to teach courses requiring certification who are approved on an "applied

for" status must file a valid Florida Teacher's Certificate not later than ninety (90) days from the date of employment. Failure to provide such certificate within the specified time may result in [rescission] of the appointment.

5. Part-time, temporary teachers shall be paid an hourly salary based upon the Salary Schedule adopted for part-time temporary employees.

6. Part-time teaching experience cannot be used toward experience credit on the full-time Teacher Salary Schedule.

7. Part-time, temporary teachers shall not be eligible for a continuing contract or for a Professional Service Contract and are not entitled to fringe benefits.

10. As a part-time, temporary employee, Petitioner did not hold a regularly-established position with the School Board. Petitioner's employment with the School Board was term-to-term, and he had no expectation of continued employment. Because Petitioner held a temporary position, he is not eligible for service credit in the FRS based on his employment with the School Board.

11. Even though Petitioner is not entitled to eligible service credit in the FRS based on his employment with the School Board, he is eligible to participate in the FICA Alternative Plan, which is separate and distinct from the FRS.

12. The FICA Alternative Plan is designed for individuals, such as Petitioner, who held temporary positions and, therefore,



are ineligible for service credit in the FRS. Petitioner participated in the FICA Alternative Plan through his employment with the School Board. As a participant in the FICA Alternative Plan, Petitioner contributed to the plan, the School Board did not contribute to the plan, and Petitioner was prohibited from participating in the FRS.

13. In 2008, Petitioner requested that Respondent review his service with the School Board to determine if he is eligible for coverage under the FRS based on his employment with the School Board. On June 23, 2008, Respondent informed Petitioner that he is not eligible for creditable service based on the fact that he was employed by the School Board as a part-time, temporary employee. No clear point-of-entry was provided by Respondent at that time for Petitioner to institute formal proceedings to challenge the decision.

14. On March 9, 2009, Petitioner submitted a Florida Retirement System Pension Plan Application for Service Retirement to Respondent. On March 11, 2009, Respondent wrote to Petitioner acknowledging the receipt of his service retirement application, and an effective retirement date of April 1, 2009. Respondent also provided Petitioner with an estimate of retirement benefits, which is based on an employment termination date of January 4, 1991, and Petitioner's 11.91 years of service with FDLES.

15. Subsequently, Petitioner was added to the retirement payroll effective April 2009, and he has received monthly retirement benefits based on his 11 years and 11 months of service with FDLES.

16. The evidence adduced at the final hearing established that Petitioner timely claimed creditable service for retirement benefits pursuant to section 121.085. Petitioner first sought creditable service for retirement benefits in 2008, based on his employment with the School Board. However, Petitioner did not retire from the School Board until 2009.

17. Nevertheless, Petitioner is not eligible for creditable service for his years of employment with the School Board because his employment with the School Board was in the part-time, temporary position of an adult vocational education instructor.

#### CONCLUSIONS OF LAW

18. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2014).

19. Petitioner has the burden of proving by a preponderance of the evidence that he is entitled to creditable service under the FRS. Wilson v. Dep't of Admin., Div. of Ret., 538 So. 2d 139, 141-42 (Fla. 4th DCA 1989).

20. Respondent administers the FRS as authorized in chapter 121, Florida Statutes, and the rules promulgated in Florida Administrative Code Chapter 60S.<sup>4/</sup>

21. Rule 60S-1.002(2), effective September 17, 2003, provides:

The Division shall deny membership to any officer or employee who does not meet the requirements for membership in the Florida Retirement System as set forth in Chapter 121, F.S., and these rules.

22. Section 121.021(11), Florida Statutes (2008), defines "employee" as:

(11) "Officer or employee" means any person receiving salary payments for work performed in a regularly established position and, if employed by a city, a metropolitan planning organization, or a special district, employed in a covered group.

23. Section 121.021(52)(b), Florida Statutes (2008), defines a "regularly established position" as follows:

(52) "Regularly established position" is defined as follows:

(b) In a local agency (district school board, county agency, community college, city, metropolitan planning organization, or special district), the term means a regularly established position which will be in existence for a period beyond 6 consecutive months, except as provided by rule.

24. Section 121.021(53)(b), Florida Statutes (2008), defines a "temporary position" as follows:

(53) "Temporary position" is defined as follows:

(b) In a local agency, the term means an employment position which will exist for less than 6 consecutive months, or other position as determined by rule of the division, regardless of whether it will exist for 6 consecutive months or longer.

25. As authorized by sections 121.021(52)(b) and (53)(b), the Division has defined "temporary position" in rule 60S-1.004(5), effective January 1, 2006, which provides, in relevant part:

(5) An employee who is filling a temporary position shall not be eligible for membership in the Florida Retirement System. Records documenting the intended length of a temporary position and the dates of employment of an employee in such position must be maintained by the agency. An employer employing a person in a temporary position shall advise the employee at the time of his employment that he is filling a temporary position and cannot participate in the Florida Retirement System or claim this temporary employment later for retirement purposes. A position shall not be considered temporary due to the uncertainty of the employee's intention to continue employment. A position meeting the definition below shall be a temporary position.

\* \* \*

(b) A temporary position in a local agency is:

1. An employment position which will not exist beyond 6 consecutive calendar months;  
or

2. An employment position which is listed below in paragraph (d) regardless of whether it will exist beyond 6 consecutive months.

\* \* \*

(d) The following types of positions in a local agency are considered temporary positions for retirement purposes. Documents to support such temporary positions listed below must be maintained in the agency's records (see subsection 60S-5.007(2), F.A.C.).

\* \* \*

3. Temporary Instructional Positions (positions which are established with no expectation of continuation beyond one semester or one trimester at a time, to teach in a community college, public school, or vocational institution; effective July 1, 1991, such positions may include paper graders, tutors, notetakers, and lab tutors at community colleges).

26. Section 121.085, Florida Statutes (2008), provides, in pertinent part:

(1) The department shall adopt rules establishing procedures for the submission of evidence or information necessary to establish a member's claim of creditable service.

(2) No creditable service which remained unclaimed at retirement may be claimed or purchased after a retirement benefit has been cashed or deposited.

27. Turning to the instant case, Petitioner proved by a preponderance of the evidence that he timely made a claim to Respondent for creditable service in 2008, prior to his

retirement. In 2008, Petitioner wrote to Respondent, seeking to establish that he is entitled to creditable service based on his employment with the School Board. In response to Petitioner's request, Respondent wrote to Petitioner advising him that he is not entitled to creditable service based on his employment with the School Board, because he is a temporary, part-time employee.

28. However, even though Petitioner timely claimed creditable service, he did not prove, by a preponderance of the evidence, that he is entitled to creditable service based on his employment with the School Board. Throughout the entire course of Petitioner's employment with the School Board, Petitioner held the same position of a part-time, temporary, vocational education instructor. Petitioner had no expectation of continued employment, and he knew his employment was temporary. At no time during his employment with the School Board did Petitioner hold a regularly-established position.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by the Department of Management Services, Division of Retirement, concluding that Petitioner is not eligible for creditable service for his employment with the School Board.

DONE AND ENTERED this 28th day of August, 2014, in  
Tallahassee, Leon County, Florida.



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DARREN A. SCHWARTZ  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 28th day of August, 2014.

ENDNOTES

<sup>1/</sup> During the conference, the undersigned inquired whether either party wished to have the final hearing continued. Both parties expressed their intent to go forward with the final hearing on July 31, 2014, as indicated above.

<sup>2/</sup> The testimony of Ms. Morgan was offered by deposition. The deposition transcript and accompanying exhibits were received into evidence at the hearing as Respondent's Composite Exhibit 8. The deposition transcript shows that Ms. Morgan was unavailable for the hearing.

<sup>3/</sup> At that time, the Division of Retirement was a division with the Florida Department of Administration.

<sup>4/</sup> The applicable rules and statutes are those in effect in April 2009 when Petitioner retired his employment with the School Board. Unless otherwise indicated, all references to the statutes and rules are to those in effect in April 2009.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.